INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes and rules involved	2
Statement	2
Summary of argument	16
Argument	21
I. The Committee's investigation of Communist activity in basic industry was pursuant to a valid legislative purpose and did not violate the First Amendment	22
A. The governmental interests at stake outweigh the individual interests in these particular circumstances	23
B. The trial court properly excluded expert testimony concerning the First Amendment issue	26
II. The statute under which petitioner was convicted is not unconstitutionally vague	33
III. The Committee's rules did not require the Committee to grant petitioner's request to appear at an executive session	36
IV. The questions which were the basis for Counts 2 and 4 were not too vague to support the indictment	39
Conclusion	46

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CITATIONS

Cases:

	Page
American Communications Ass'n v. *Douds*, 339 U.S. 382	32
Barenblatt v. *United States*, 360 U.S. 109	16, 17, 19, 21, 22, 23, 24, 27, 32, 33, 35, 41, 42, 45.
Braden v. *United States*, 365 U.S. 431	17, 19, 22, 23, 32, 33, 35
Carlson v. *Landon*, 342 U.S. 524	32
Dennis v. *United States*, 341 U.S. 494	32
Deutch v. *United States*, 367 U.S. 456	42, 43
Kessler v. *Strecker*, 307 U.S. 22	40
United States v. *Debrow*, 346 U.S. 374	40
Sacher v. *United States*, 356 U.S. 576	34
Watkins v. *United States*, 354 U.S. 178	34
Wilkinson v. *United States*, 365 U.S. 399	17, 19, 22, 23, 24, 32, 33, 35
Constitution:	
First Amendment	7, 11, 16, 18, 22, 24, 26, 31, 32, 35
Sixth Amendment	20, 39, 40
Statute and rules:	
Subversive Activities Control Act of 1950, Title I, § 2, 64 Stat. 987–989	32
2 U.S.C. 192	2, 19, 33, 40, 43
Federal Rules of Criminal Procedure, Rule 7 (c)	20, 39, 40, 41
Rules of the Supreme Court of the United States Rule 40(1)(d)(2)	20, 39
Congressional material:	
Hearings before the Committee on Un-American Activities, House of Representatives, 85th Cong., 2d Sess., entitled "Investigation of Communist Infiltration and Propaganda Activities in Basic Industry (Gary, Inc., Area)"	3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 43, 44

Congressional material—Continued Page
Rules of Procedure, House Committee on Un-American Activities, Rule IV–A .. 2, 19, 20, 37, 38
Rules of the House of Representatives, as amended by the Legislative Reorganization Act of 1946, Chap. 753, Sec. 121, 60 Stat.:
Rule XI 2, 19, 34, 35
Rule XI, Sec. 26(m) 2, 38

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 477

EDWARD YELLIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals is reported at 287 F. 2d 292.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1961, and a petition for rehearing was denied on April 3, 1961. On April 21, 1961, Mr. Justice Black extended the time to file the petition for a writ of certiorari to and including June 2, 1961. The petition was filed on May 31, 1961 and certiorari was granted on October 9, 1961 (R. 299). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the questioning of petitioner by the House Un-American Activities Committee concerning his membership in the Communist Party and the Party's program of "colonization" of the steel industry was pursuant to a valid legislative purpose and consistent with petitioner's rights under the First Amendment.

2. Whether the trial court erred in excluding expert testimony on the factors which should be considered by the court in determining petitioner's rights under the First Amendment.

3. Whether petitioner was convicted under a statute which is unconstitutionally vague.

4. Whether the Committee violated its own rules in refusing to question petitioner in executive session.

STATUTES AND RULES INVOLVED

Section 192 of Title 2, U.S.C. (R.S. 102, as amended) and the pertinent portions of Rule XI of the House of Representatives and of the Rules of the Committee on Un-American Activities are set forth in petitioner's brief at pages 3–4.

STATEMENT

Petitioner was charged in a five-count indictment with having refused, in violation of 2 U.S.C. 192, to answer questions pertinent to the matter under inquiry asked him by the Committee on Un-American Activities of the House of Representatives. Count 5 was dismissed on motion of the government (R. 11). Upon a trial without a jury, the court found petitioner guilty as charged in Counts 1, 2, 3, and 4. The court imposed a sentence of one year on each count,

the sentences to run concurrently, and a fine of $250 (R. 116–118). The court of appeals affirmed the conviction.

The pertinent facts may be summarized as follows:

1. The Committee on Un-American Activities passed a resolution on January 15, 1958, providing that hearings would be held in Gary, Indiana, to inquire into (Hearings,[1] p. 1956):

> 1. The extent, character, and objects of Communist infiltration and Communist Party propaganda activities in basic industry in the Gary, Indiana, area, the legislative purpose being to obtain additional information for use by the Committee in its consideration of Section 16 of H.R. 9352, relating to the proposed amendment of Section 4 of the Communist Control Act of 1954, prescribing a penalty for knowingly and willfully becoming or remaining a member of the Communist Party with knowledge of the purpose or objective thereof, and for the additional legislative purpose of adding to the Committee's overall knowledge on the subject, so that Congress may be kept informed and thus prepared to enact remedial legislation in the national defense and for internal security when and if the exigencies of the situation require it.
>
> 2. Execution by administrative agencies concerned of Public Law 637, of the 83rd Con-

[1] Hearings before the Committee on Un-American Activities, House of Representatives, 85th Cong., 2d Sess., entitled "Investigation of Communist Infiltration and Propaganda Activities in Basic Industry (Gary, Ind., Area)." This document, which is hereinafter referred to as "Hearings," constitutes Gov. Ex. 15.

gress known as the "Communist Control Act of 1954", relating to the eligibility to exercise the rights and privileges provided under the National Labor Relations Act of labor organizations determined by the Subversive Activities Control Board to be Communist-infiltrated organizations. The legislative purpose is to assist Congress in appraising the administration of the Communist Control Act of 1954 and to enact such amendments thereto as the exigencies of the situation require.

3. Any other matter within the jurisdiction of the Committee which it or any subcommittee thereof, appointed to conduct this hearing, may designate.

Petitioner was subpoenaed to appear at the hearings in Gary on February 10, 1958. His counsel sent a telegram to the Committee's counsel on February 6, 1958, asking that petitioner be questioned in executive session because "[t]estimony needed for legislative purposes can be secured in executive session without exposing witnesses to publicity" (Def. Ex. 1). On that same date, the Staff Director of the Committee telegraphed petitioner denying the request (Def. Ex. 2).

Public hearings were held in Gary, Indiana, by a subcommittee on February 10 and 11, 1958. At the opening of the hearing on February 10, the chairman of the Committee, in petitioner's presence (Hearings, p. 1977), read the above-quoted resolution of the Committee authorizing the hearings and explained at length the purpose of the hearings in Gary (*id.* at 1955–1957). The chairman stated, *inter alia*, that the subcommittee was "in Gary for the purpose of re-

ceiving testimony concerning Communist techniques and tactics of infiltration and the extent, character, and objects of Communist Party propaganda activities in basic industries"; that such an inquiry had great importance to internal security; that the hearing was intended as part of the Committee's "surveillance over existing security legislation," including the Internal Security Act, the Foreign Agents Registration Act, the Communist Control Act, and various espionage statutes "for the purpose of recommending any needed legislative amendments"; and that the Committee hoped to secure information useful in its consideration of H.R. 9352, an omnibus bill to amend the Internal Security Act of 1950, which was pending before it (*id.* at pp. 1956–1957).

Petitioner was present (Hearings, p. 1976) at the time John Lautner, the first witness at the hearing, testified (*id.* at pp. 1958–1974). Mr. Lautner, who was an organizer and high functionary in the Communist Party from 1930 to 1950, testified that in 1945 the Party condemned the "revisionist" policies which it had followed under its former leader, Earl Browder, and returned to the basic principles of Marxism-Leninism; that, after the Party was reconstituted, it re-established its policy of concentration in basic industry; that as a result of this policy "colonization" was begun and Party "colonizers" were sent to all parts of the country to coordinate Party work in basic industries including the steel industry (*id.* at pp. 1964–1965); and that these colonizers were generally young Party members from colleges and universities who left to become "professional revo-

lutionaries" (*id.* at p. 1967). Mr. Lautner further testified that (*id.* at p. 1968):

> Lenin said:
>
> > "It is necessary to be able to withstand all this, to agree to any and every sacrifice, and even—if need be—to resort to all sorts of devices, manoeuvres, and illegal methods, to evasion and subterfuge, in order to penetrate into the trade unions, to remain in them, and to carry on Communist work in them at all costs."
>
> This is the underlying principle on the basis of which these people [the colonizers] will deny their name, will deny their education, will deny everything, because that denial furthers the aims and objectives of the Communist Party. It would be a liability for him to be a worker in the mill if he has a college degree; it wouldn't look good. There would be immediately a suspicion of an ulterior motive in that, so they are carrying out a Leninist policy when they do that.

Petitioner, the second witness appearing on February 10, was questioned immediately after Lautner (Hearings, pp. 1974–1988). Petitioner answered preliminary questions as to his name and present residence. When the Committee chairman refused to allow petitioner's counsel to read into the record the telegrams between himself and the Committee, petitioner's counsel stated that he would be satisfied if the record showed that the exchange of telegrams had occurred (*id.* at p. 1974). Petitioner then refused to answer the question, "Where did you reside prior to September, 1957?" (Count 1) (*id.* at pp. 1974–1975). He stated as his grounds for refusing

to answer that the First Amendment forbids Congress to investigate opinions and beliefs; that the authorizing resolution of the Committee is so vague that it might deprive him of due process of law; and that the question was not pertinent to any legislation (*id.* at pp. 1976–1977). After petitioner was directed to answer the question, he explicitly stated that he relied on the First Amendment and not the privilege against self-incrimination (*id.* at p. 1977). Apparently in doubt whether petitioner was challenging the pertinency of the question to the subject under inquiry, the committee counsel ascertained that petitioner was present when the chairman made his opening statement which explained the purpose of the hearing and then stated (*id.* at p. 1977):

> This is a hearing which involves a subject described by the chairman, and it relates to Communist Party activities within the area of Gary. As far as pertinency of the question is concerned, as to which you seem to express some doubt, it would be impossible for us to learn anything from you regarding Communist Party activities in this area without ascertaining whether or not you were here for a period of time.

Petitioner then was again directed to answer the question and he again refused (*id.* at p. 1978).

Petitioner next was asked to state his formal education. He refused to answer because the question could serve no legislative purpose and violated his First Amendment rights (Hearings, p. 1978). When asked whether he was a student at the College of the

City of New York for several years prior to 1948 he invoked the same grounds and said (*ibid.*):

> [I]f the committee knows all these things, I can't see the purpose or the pertinency of asking me what they consider a known fact. Furthermore, it kind of appears to me as if this line of questioning is merely trying to create an impression and expose me for the sake of merely exposing me and not leading to any valid legislative purpose.

The Committee chairman then assured petitioner that it was not the purpose of the question to expose him.

The Committee received in evidence copies of petitioner's college record showing that he transferred from the College of the City of New York to the University of Michigan and from the College of Literature, Science and Arts at the University of Michigan to its Engineering Department in 1948 (Hearings, pp. 1979, 1980–1981) and petitioner's application for employment at the Carnegie-Illinois Steel Corporation dated June 23, 1949, which left blank the line asking for the applicant's college education (*id.* at pp. 1982, 1983–1984). Petitioner refused to answer whether his name was at the bottom of the latter application, where he was residing on June 23, 1949, whether he lived at a specified address in Gary at that time (as the application for employment said), whether he was ever employed at the Reo Motor Company in Lansing, Michigan (the application stated that petitioner had been employed at Reo from 1946 to February 1948), whether he had been employed by Modern Distributors from February 1948 to April

1948 (as the employment application showed despite the statement in the University of Michigan records that he was at the University from February 1948 until June 1949), whether he was employed by Reo from April 1948 to May 1949 (as the employment application also said), why he had failed to include on his employment application his education at the College of the City of New York or the University of Michigan, and whether "at the time you sought that employment in Gary, Indiana, in steel, you were doing it at the instance or under counseling from the Communist Party or leaders in the Communist Party" (*id.* at pp. 1982–1985). Petitioner refused to answer all these questions for the same reasons he had earlier stated.

Petitioner was then asked, "Will you tell the committee please, whether or not incidents came to your attention of the colonization of the steel unions in Gary by the Communist Party at any time prior to September 1937?" (Count 2) (Hearings, p. 1985). When petitioner refused to answer for the same reasons, the Committee counsel again explained the pertinency of the question (*id.* at p. 1986):

> It has been testified here that colonization of young men in the middle of their educational courses in industry was a deep-seated plan of the Communist Party to strengthen itself within basic industry. The chairman's opening statement indicated that the activities of the Communist Party within basic industries was the subject of inquiry here.
>
> * * * * *

> The statement was made here of the practice of the Communist Party in colonizing industry at Flint, Michigan; at the University of Colorado, which is at Fort Collins, Colorado, where you now reside; and other places.
>
> In order to understand the full tactics of the Communist Party in its operations here in Gary, it is necessary the committee understand fully the extent of such practices, the full purposes of it, and the methods by which it is put into effect. That is the connective reasoning of the committee in asking the question.

On the grounds already stated, petitioner declined to answer whether he was a member of the Neafus Club of the Communist Party at the University of Michigan, whether he was acquainted with Francis X. T. Crowley at the University of Michigan, and whether Crowley was correct when he testified before the Committee in 1954 that petitioner was a member with him of the Neafus Club (*id.* at p. 1987).

Petitioner refused, for the same reasons, to answer the question, "Were you a member of the Communist Party on the 23rd day of June, 1949, which is the date of application filed in your name for employment in Gary?" (Count 3) (Hearings, p. 1987). He similarly refused to answer whether he was active in the American Veterans Committee prior to June 1949, and whether he was acquainted with Edward Shaffer of Pittsburgh. Petitioner was shown a copy of the *Detroit News* dated January 7, 1949, reporting that three students, including Edward Shaffer of Pittsburgh and petitioner, resigned from the University of

Michigan Chapter of the American Veterans Committee after the Committee in its annual convention adopted a resolution calling for the ouster of members belonging to the Communist Party. Petitioner refused to answer whether this report was correct (*id.* at pp. 1987–1988). He then declined to answer, "Will you tell the committee whether or not in 1957 there were present in any of the steel unions at Gary, Indiana, persons who were known to you to have been colonizers of the Communist Party" (Count 4) (*id.* at p. 1988). Finally, petitioner refused to answer three more questions: whether he was a member of the Communist Party in August 1957; what stand did the Party take in Gary regarding the acts of the Soviet Union in Hungary in 1956; and whether he was at the time of the hearing a member of the Communist Party (*ibid.*).

Later on February 10, the subcommittee heard the testimony of Joseph LaFleur, who worked in the steel industry in Gary and had joined the Communist Party at the request of the F.B.I. He discussed at length Communist activities in the Gary area and in the steel industry in particular. Mr. LaFleur described petitioner as one of several well-educated, young Party members who had come to Gary to help organize Party activities in the steel mills (Hearings, pp. 2016–2017). Subsequently, the Committee asked two other witnesses who worked in the steel industry whether they were acquainted with petitioner. Both refused to answer this question, as well as numerous other questions concerning Communist activities, on the basis of the First Amendment (*id.* at pp. 2055, 2063).

2. At petitioner's trial, the government's sole witness was Frank S. Tavenner, counsel for the Committee, who was present at the Gary hearings and interrogated petitioner. He testified that the purpose of the hearings was "to find out how serious the Communist propaganda activities and infiltration were in basic industry, particularly with regard to the steel industry in this area" (R. 18); that the reason that the Committee wanted the information was that it had held a series of hearings on this subject in Baltimore, Youngstown, Ohio, and other places, and the Committee was of the opinion that it might be necessary to amend various acts of Congress to "tighten up laws with regard to Communist activities in this field" (R. 18); and that the Committee considered the steel industry to be the most important basic industry in the country, and Gary, Indiana, was one of the centers of the steel industry (R. 25).

Tavenner further testified that members of the Committee introduced several bills around the time of these hearings relating to the internal security field:

H.R. 2369, sponsored by Congressman Walter, the Chairman of the Committee and of the subcommittee holding the hearings in Gary, to redefine the term "organize" as used in the Smith Act so as to include continuing acts of organizing (R. 27);

The Defense Facilities Protection Act of 1959, introduced by Congressman Scherer (who was one of the members of the subcommittee holding the hearings in Gary), to permit the federal government to guard strategic defense facilities against espionage, sabotage, and other subversion (R. 23);

H.R. 9352, an omnibus bill introduced by Congressman Walter to amend the Internal Security Act of 1950 (Gov. Ex. 14; R. 23–24);

H.R. 8121, a bill to amend the Subversive Activities Control Act of 1950 by authorizing the Secretary of Defense to provide for a security program with respect to defense contractors and their employees (Gov. Ex. 18; R. 65).

Tavenner stated at the trial that prior to calling petitioner the Committee had information that petitioner was a member of the Communist Party while at the University of Michigan in 1949; that he had previously attended City College of New York; and that he had filed an application for employment in 1949 at the Carnegie-Illinois Steel Corporation in Gary, Indiana, in which he failed to set out his college and university education (R. 34–35). Tavenner testified that the Committee wanted to find out from petitioner what knowledge he had of the execution of the Communist Party's plan to colonize the steel industry (R. 35).

On cross-examination, Tavenner stated that it was the practice of the Committee to interview prospective witnesses before subpoenaing them "if there is any chance in the world of obtaining co-operation from them" (R. 53). Petitioner was not interviewed since he was then in Denver. Tavenner admitted, however, that if petitioner had been in Gary, he probably would not have been interviewed, even though the Committee did not know whether he would cooperate, since the Committee had information that he was a member of the Communist Party (R. 53, 58,

62). Tavenner emphasized that the Committee subpoenaed petitioner to testify with the hope he would cooperate (R. 52–54) and inform the Committee whether he had concealed facts on his employment application "pursuant to a Communist Party plan to colonize [the steel] industry, and the extent to which that colonization was progressing" (R. 53). Tavenner explained that the Committee believed that petitioner had information which had not been presented by any of the witnesses at the Committee's previous hearings on the Party's industrial concentration program (R. 55):

> We knew nothing about the actual activities of the Communist Party in the steel plants in Indiana as of the time of this hearing, or shortly before. Mr. LaFleur, who did testify [at the Gary hearings], according to my recollection got out of the Communist Party in 1950.[2] This witness, Mr. Yellin, as to whom we had testimony by several people, had been a member of the Communist Party at Michigan University, and had left there and come down and taken employment in Gary.

Tavenner later testified (R. 57):

> Now, with that information relating to Mr. Yellin, we felt certain that Mr. Yellin was in a position, if he would do so, to tell this Committee a great many things regarding the plan of the Communist Party to infiltrate the steel industry here, and to building up the Communist Party from its grass roots level, and just what the Communist Party plans were to make

[2] Joseph LaFleur testified that he left the Party in 1952 (Hearings, p. 2013).

> these bright young men leaders who did this thing of colonizing.

Representative Walter, the chairman of the Committee and of the subcommittee that conducted the hearings in Gary, was called to testify by petitioner. Mr. Walter stated that he did not know of petitioner's telegram asking for an executive session until after the public hearing in Gary started, since it was not addressed to him and he had left Washington for Gary by the time the telegram arrived; that neither the Committee counsel, to whom the telegram was addressed, nor the Committee staff director, who sent the telegram refusing to hear petitioner in executive session, had the authority to pass on such a request (R. 68–69); that at the time petitioner's counsel attempted to introduce the telegrams at the hearings, "it was too late then to raise any question that might have been raised by the telegram" for "the Committee [had] already passed on the question of whether or not we would hear Mr. Yellin at a session when the purpose of calling him was discussed, and it was decided then that the rule with respect to an executive session was not applicable" (R. 69–70). When asked what considerations the Committee used in determining whether to hold an executive session, Congressman Walter testified (R. 82):

> This is usually done when the Committee is fearful lest a witness will mention the name of somebody against whom there is no sworn testimony, and in order to prevent the name of somebody being mentioned in public that we are not sure has been active in the conspiracy,

at least that there isn't sworn testimony to that effect, we have an executive hearing.

As to the Committee's purpose in subpoenaing petitioner, Congressman Walter stated that "[we] concluded that this would be a fine witness for the Committee in support of proposed legislation having to do with colonization, and, two, having to do with the protection of our defense efforts. And it is always worth a chance that somebody will testify" (R. 70). While Congressman Walter admitted that many witnesses refuse to testify, "occasionally we are very pleasantly surprised by having somebody give us information that is of great value in the drafting of legislation" (R. 82).

Petitioner called Professor Thomas I. Emerson of Yale to testify as an expert on the factors which should be considered by the district court in balancing the public and private interests in order to determine whether petitioner's First Amendment rights had been violated. The court ruled that this testimony was not admissible because it was opinion evidence on questions of law (R. 98–100, 116). Professor Emerson's testimony was then heard as an offer of proof (R. 99–115).

SUMMARY OF ARGUMENT

I

The Committee's investigation of Communist activities in basic industry and particularly in the steel industry, in the Gary, Indiana, area was pursuant to a valid legislative purpose and did not violate the First Amendment. Petitioner's basic contentions on this point, as he himself admits, have been answered by

this Court in *Barenblatt* v. *United States*, 360 U.S. 109, *Wilkinson* v. *United States*, 365 U.S. 399, and *Braden* v. *United States* 365 U.S. 431. There, the Court held that, in circumstances comparable to the present case, Congressional investigation of Communist activities has a valid legislative purpose and committees conducting such investigations may compel witnesses to testify concerning their Communist activities without violating their rights under the First Amendment.

A. The governmental interest in this case even more clearly outweighs the individual interests than in the *Barenblatt* case. Here, as in *Barenblatt*, there is no indication that the subcommittee was attempting to pillory the witness; the witness did not appear as a result of indiscriminate dragnet procedures lacking in probable cause for belief that he possessed information which might be helpful to the Committee; and "the relevancy of the questions * * * is not open to doubt." Moreover here the Committee was investigating Communist activities in basic industry, an area which is less directly protected than the field of education that was involved in *Barenblatt*, and which is of obviously great importance to the national security.

Petitioner contends that the Committee had no governmental interest in questioning him because it had all the information concerning Communist activities which petitioner could have supplied. Even if, however, the witness had no new information, there is a strong governmental interest in having the witness corroborate previous testimony—particularly since the existing evidence is in a controversial area and is

therefore likely to be challenged. In addition, while the Committee had conducted hearings on Communist activities in the steel industry in other localities, it had conducted no such investigation on the related, but distinct, subject of Communist activities in the steel industry in Gary, Indiana. There is no evidence in the record that petitioner could not have provided valuable information on this subject. Petitioner could not unilaterally determine—by comparing his own knowledge which he has not disclosed with the information possessed by the Committee—that he could supply no new information.

B. The trial court properly excluded the testimony of Professor Emerson concerning petitioner's claim that his rights under the First Amendment had been violated. The questions asked Professor Emerson sought his "opinion" "as to the various factual considerations which have to be taken into account in balancing the competing public and private interests at stake." Professor Emerson's answer principally described what legal factors the courts should consider and what weight should be given to each of these factors, not factual evidence relating to the factors which the court might consider. While this statement could properly be presented as legal argument, the trial court correctly held that it was not evidence.

Even if, however, Professor Emerson's statements were properly admissible, petitioner's conviction should still be sustained. The statement was offered solely in relation to the First Amendment issue, which was a question of law. Since the entire statement is in the record, it can properly be considered by this

Court. Professor Emerson, however, added little to the basic contentions already considered by this Court in the *Barenblatt*, *Wilkinson*, and *Braden* cases. Therefore, we submit that here, as in those cases, the Congressional investigation of Communist activities did not violate the First Amendment.

II

Petitioner contends that the statute under which he was convicted is unconstitutionally vague. Petitioner, however, was convicted of violating 2 U.S.C. 192, the contempt-of-Congress statute and this Court has repeatedly upheld convictions under that statute. The argument is in reality aimed, not at the statute under which petitioner was convicted, but at the House resolution authorizing the Committee. House Rule XI is, of course, not a criminal statute, and therefore this Court has never construed it as one. The Court has three times held that House Rule XI is sufficiently clear to authorize the Committee to compel testimony in an investigation into Communist activities. *Barenblatt* v. *United States*, *supra*, 360 U.S. at 117; *Wilkinson* v. *United States*, *supra*, 365 U.S. at 409; *Braden* v. *United States*, *supra*, 365 U.S. at 433.

III

Rule IV-A of the Committee's rules did not require that petitioner's request to appear at an executive session be granted. Rule IV-A provides that a witness may be heard in executive session whenever "a majority of the Committee * * * believes that the interrogation of a witness in a public hearing might

* * * injure his reputation." Clearly, this rule does not give a witness a right, upon request, to appear at an executive session; instead, the rule leaves it to the discretion of a majority of the Committee whether to interrogate the witness in executive session. The evidence here showed that the Committee had considered the matter and decided that petitioner should not be called in executive session. Even if Rule IV implicitly provided for judicial review—which we do not think it does—there is nothing in this record to suggest that the Committee abused its discretion.

IV

Petitioner contends that the questions involved in Counts 2 and 4 are too vague to meet the requirements of the Sixth Amendment and Rule 7(c) of the Federal Rules of Civil Procedure. Petitioner, however, is precluded from raising this issue because it was not presented in his petition for a writ of certiorari. Rule 40(1)(d)(2) of the Rules of this Court.

In any event, the Sixth Amendment and Rule 7(c) require that "[t]he indictment * * * be a plain, concise and definite written statement of the essential facts constituting the offense charged" (Rule 7(c)), so that the accused can adequately defend himself and prevent a second prosecution for the same offense. The indictment clearly stated all the elements of the offense, including the questions which petitioner refused to answer. The fact that the indictment did not spell out the meaning of the questions did not prejudice petitioner since no possible defense

turns on their meaning except that the reason petitioner had not answered the questions is that he did not understand them. But that issue—which petitioner specifically refuses to claim—depends on whether the witness understands the question at the time he refused to answer before the Committee; it would do no good, on that issue, to explain the question subsequently in the indictment.

ARGUMENT

Petitioner was convicted for refusing to answer four questions asked him by a Congressional committee during an investigation of Communist activities in basic industry, and particularly in the steel industry, in the Gary, Indiana, area. Two of these questions—where he resided prior to September 1957 (Count 1), and whether he was a Party member on June 23, 1949 (Count 3)—concerned only his own Party activities. The other two questions[3]—whether he knew of Party colonization in the steel unions in Gary before 1957 (Count 2) and whether there were Party colonizers in the steel unions in Gary in 1957 (Count 4)—concerned the Party activities of other persons but did not require the divulgence of their identity. Since petitioner was sentenced to serve concurrent terms of imprisonment and to pay a fine which was less than the maximum authorized by the statute under any one count, the judgment below must be affirmed if petitioner's refusal to answer any one of the questions was unlawful. *E.g., Barenblatt* v. *United States,* 360 U.S. 109, 115.

[3] The indictment contained five counts, but Count 5 was dismissed on motion of the government (R. 11).

I

THE COMMITTEE'S INVESTIGATION OF COMMUNIST ACTIVITY IN BASIC INDUSTRY WAS PURSUANT TO A VALID LEGISLATIVE PURPOSE AND DID NOT VIOLATE THE FIRST AMENDMENT

As he himself admits (Pet. Br. 14–15, 34), petitioner's basic contentions that the Committee was not acting pursuant to a valid legislative purpose and that it violated his rights under the First Amendment have been answered by this Court in *Barenblatt* v. *United States, supra, Wilkinson* v. *United States,* 365 U.S. 399, and *Braden* v. *United States,* 365 U.S. 431. Those cases established that Congressional investigation of Communist activities, in circumstances comparable to the present case, has a valid legislative purpose and that committees conducting such investigations may compel witnesses to testify concerning their Communist activities without violating their rights under the First Amendment.

Petitioner also raises First Amendment contentions which are based on the particular circumstances of the present case. In *Barenblatt, supra,* 360 U.S. at 126, this Court adopted the rule that "[w]here First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown." Petitioner contends that, unlike in *Barenblatt,* the record in this case establishes that the individual interests outweigh the governmental interests. In addition, he claims that the trial court erred in excluding the testimony of Professor Thomas I. Emerson

of Yale University concerning the balance to be struck. We submit that these contentions are without merit.

A. THE GOVERNMENTAL INTERESTS AT STAKE OUTWEIGH THE INDIVIDUAL INTERESTS IN THESE PARTICULAR CIRCUMSTANCES

The Court in *Barenblatt*, as well as in *Wilkinson* and *Braden*, found that "the balance between the individual and the governmental interests here at stake must be struck in favor of the latter, and * * * therefore the provisions of the First Amendment have not been offended" (360 U.S. at 134; see 365 U.S. at 413–415; 365 U.S. at 435). We submit that the governmental interests in this case even more clearly outweigh the individual interests involved than in the *Barenblatt*, *Wilkinson*, and *Braden* cases.

The Court in *Barenblatt* mentioned three particular considerations in weighing the private and public interests (360 U.S. at 134). First, the Court found that "[t]here is no indication in this record that the Subcommittee was attempting to pillory witnesses" (*ibid.*). Similarly, there is no such indication in this record. The subcommittee allowed petitioner to state his objections fully, and then made a considerable effort to persuade him to testify, even explaining the pertinency of the questions despite the absence of any specific objection that their pertinency was unclear (see *supra*, pp. 7, 9–10).

Second, the Court found in *Barenblatt* that the witness did not appear as a result of "indiscriminate dragnet procedures, lacking in probable cause for belief that he possessed information which might be helpful to the Subcommittee" (360 U.S. at 134).

Here, the Committee had information that petitioner was a long-time Party member who had actively participated in the Party's organization of the steel industry in the Gary, Indiana, area (see *supra*, pp. 13, 14), which was a vital part of the subcommittee's investigation of Communist activities in basic industry in Gary (see *supra*, pp. 3, 4–5, 7, 9–10, 12).

And, third, the Court in *Barenblatt* said that "the "relevancy of the questions * * * is not open to doubt" (360 U.S. at 134). The same is equally true in this case; indeed, the pertinency of the questions to the subject under inquiry was not only clear on the face of the questions, but was explained to petitioner at the hearing even though he did not explicitly claim any lack of pertinency to the subject under inquiry then or at any time during the judicial proceedings.

In addition to these considerations, an even more important circumstance supports the same result here as in *Barenblatt*. In the latter case, the witness was a college teacher by profession and the investigation sustained by this Court was into Communist infiltration in the field of education. In *Wilkinson* and *Braden*, the Court upheld Congressional inquiry into Communist propaganda activities. Thus, the fields of education and propaganda, although clearly within the general area protected by the First Amendment, nevertheless may be the subjects of a proper investigation; *a fortiori*, the Committee could investigate Communist activity in basic industry, which is less directly protected by the First Amendment and which has obviously great importance to the national security.

Petitioner suggests (Pet. Br. 18–21) that the Committee had no governmental interest in questioning

him since it had all the information concerning Communist activities which petitioner could possibly have supplied. He argues that the Committee had conducted hearings in other localities on the same or similar subject matter; that other witnesses at the Gary hearing testified concerning all the information known to petitioner; and that therefore the Committee sought only corroboration from petitioner. But even if petitioner's conclusion is correct and the Committee expected to receive only corroborating testimony from him, there is an important governmental interest in having a well-informed witness confirm previous testimony—particularly when the existing evidence is in a controversial area and therefore is likely to be challenged.

In the present case, moreover, it is clear that the Committee was not merely seeking to confirm evidence that it already possessed. Petitioner offered no proof that he could not have contributed new information to the investigation. He did not prove at his trial what information he had at the time the Committee questioned him. He cannot unilaterally determine—by comparing his own knowledge which he has not disclosed with the information he now claims was possessed by the Committee—that he could supply the Committee with no new information.[4]

[4] Even if petitioner had testified at his trial concerning the information he possessed at the time of the hearing, we do not think a defense would have been established merely because the Committee already had the information. At the least, petitioner would have had to give this reason for his refusal to answer at the time he appeared before the Committee. Even then, we think that the value of petitioner's information—whether it was

The hearings which investigated Party colonization activities in other parts of the country (see Pet. Br. 19) were, on their face, principally concerned with different, although related subjects. Although the Committee had information concerning two of the questions (petitioner's residence in 1957 and whether he was a Party member in 1949), these were only preliminary questions to establish that petitioner had knowledge of Party activities in the steel industry in the Gary, Indiana, area. Petitioner's answers to the other two questions concerning his own knowledge of Party activities in the steel industry in Gary (whether he knew of Party colonization in the steel unions in Gary before 1957 and whether there were Party colonies in the steel unions in Gary in 1957) might merely repeat previous testimony before the Committee. On the other hand, as the Committee hoped and expected (see *supra*, pp. 14–15), petitioner's answer might well provide new information in view of his active participation in these Party activities. The Committee had reasonable ground to believe that petitioner had information on Communist infiltration in the steel industry.

B. THE TRIAL COURT PROPERLY EXCLUDED EXPERT TESTIMONY CONCERNING THE FIRST AMENDMENT ISSUE

Petitioner also argues (Pet. Br. 21–25) that the trial court erred in refusing to consider the proffered expert testimony of Professor Emerson in weighing private and public interests in order to de-

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merely cumulative or not—was for the Committee to determine. These issues, however, are not present in this case since petitioner has never shown what information he did have.

termine petitioner's First Amendment rights. This contention is likewise erroneous.

1. Professor Emerson's qualifications as an expert were that he was a professor of law at Yale University and had made extensive studies in the field of civil liberties (R. 93-97). He testified that he had "concerned [himself] a good deal with the Committee on Un-American Activities" (R. 97). His attention was then directed to this Court's decision in *Barenblatt* v. *United States*, with which he stated he was familiar, and he was asked (R. 97):

> Have you an opinion as to the various considerations which have to be taken into account in balancing the competing public and private interests at stake in the circumstances here presented?

The government objected on the ground that the question sought testimony from the witness on a matter of law, not of fact: "The question invades the province of the Court. It is asking for an interpretation of existing cases, which it is for this Court to decide, not for the witness to decide, whether or not he is an expert." (Tr. 228).[3]

The trial court held that the question sought in effect an involved legal opinion (R. 98) and sustained the government's objection to its admission (R. 99). The court, however, permitted petitioner to put the testimony into the record as an "offer of proof" for purposes of appeal. Petitioner's counsel rephrased the question to insert the word "factual" before the word "considerations" (R. 99). The government

[3] "Tr. refers to the reporter's typewritten transcript of the trial proceedings.

again objected and the objection was sustained (R. 100).

Professor Emerson testified that the government's interest in seeking information from petitioner was to pass legislation protecting against overthrow of the government by force and violence (R. 100). He stated that in weighing this interest the court should consider six factors. First, present statutes (which he described) already performed this purpose. Second, the country was strong economically, politically, and socially. Prosperity, according to Professor Emerson, made an economic collapse unlikely; no strong radical groups existed which constituted a danger to internal security, particularly since there was no indication that the police or military were sympathetic to attempts to overthrow the government; and there was no serious social unrest (R. 103). Third, Professor Emerson testified, the Communist Party was extremely weak in 1958 both in numbers and positions of importance; security programs prevented the infiltration of government and industry; and Communist power in labor unions, religious and educational institutions, and the Negro community was extremely small (R. 103–106). The fourth factor in determining the government's interest was the activity of the A.F.L.–C.I.O. and other unions in preventing Communist infiltration of labor (R. 106–107). Fifth, Professor Emerson stated that the House Un-American Activities Committee, as shown by its reports, already "had taken substantial testimony on the questions that they addressed themselves to in the Gary proceedings" (R. 107). And, finally, the

Committee could obtain substantial information from voluntary witnesses (R. 108).

Professor Emerson then expressed his opinion concerning the factors which the district court should consider in determining the individuals' interest in refusing to testify. First, citing Milton, Jefferson, Mill, Chaffee, Holmes, Brandeis, and recent psychological studies, he testified that the "freedom of expression is essential to individual integrity and dignity" and to the right to develop and realize the individual's potentialities (R. 108). Second, the witness said, the right of silence "recognized in the classic flag salute case" "is particularly important in modern society where so many pressures tend toward conformity" (R. 109). And, third, the individual has the right of association which "is based on the weakness of the individual as a single person to accomplish political or social change" (R. 109). Professor Emerson emphasized that society, as well as the individual, has an important interest in freedom of expression since it "is a basic and absolutely fundamental principle of the democratic process" (R. 109). He described the serious effect on the individual's interest from Congressional investigation of beliefs and associations: the mere questioning of the witness inhibits him from freely expressing himself; economic harm often results such as the loss of employment; and the witness is often socially ostracized (R. 110–111). In addition, other people besides the witness become afraid to engage in similar political activity and associations (R. 111). These effects are not confined, according to Professor Emerson, to the Communist

Party since it is impossible to draw any clear line; the "whole area left of center * * * becomes smeared * * * with the same color" (R. 111–112).

Finally, Professor Emerson stated that he thought that the forces in this country tending toward a closed society restricting independent thinking and activity were now stronger than those supporting an open society (R. 113). In support of this judgment, he noted the great number of government employees subject to loyalty tests, the large units which dominate the economy, and the unanimity of opinion expressed by mass media and educational institutions (R. 113–114). He therefore stated that "as of this time what is needed, in terms of freedom of expression, is that society encourage independence, unorthodoxy and differences * * *" (R. 114).

Professor Emerson concluded (R. 115):

> My answer is, on the basis of the foregoing considerations, it is my opinion that the interests of the Government in obtaining answers to the questions put to this defendant as an aid in developing further legislation to protect internal security are substantially outweighed by the interest of the individual in freedom of speech or silence, as he may prefer, and by the interest of the community in maintaining freedom of political expression and other conditions essential to maintaining an open society.

After hearing Professor Emerson's testimony, the government renewed the objection to its admission, on the same grounds as previously stated (R. 115).

In finally excluding the proffered testimony, the trial court said (R. 116):

> [I]t seems to me that expert testimony of this kind is not material in that it is not a question of fact as to what elements go to make up the balance of interests, public and private, but a legal matter, which is within the province of the Court to decide; and it is not a subject of expert testimony.

2. Petitioner's contention that the trial court's refusal to allow the introduction of Professor Emerson's testimony was reversible error is without merit for at least two reasons. First, we submit that, as the two courts below held, the testimony was not properly admissible. It consisted principally of arguments concerning what legal factors the court should consider and what weight should be given to each of these factors, not with factual evidence relating to the factors which the court might consider. Thus, Professor Emerson's statement, coming at the close of petitioner's case, reads like the closing argument of able counsel summarizing his client's legal position under the First Amendment. While such a statement could be properly presented by petitioner's counsel as legal argument, the trial court correctly held that it was not evidence.

Second, even if Professor Emerson's testimony were properly admissible, we submit that petitioner's conviction should nevertheless be sustained. This testimony was offered solely in relation to petitioner's claims under the First Amendment. The issue whether a witness' rights under the First Amendment

have been violated by a Congressional committee is, as the *Barenblatt, Wilkinson,* and *Braden* cases plainly show, a question of law. Therefore, this Court can consider Professor Emerson's testimony which is fully set forth in the record—in determining petitioner's First Amendment claims (assuming contrary to our contentions above, that the testimony is admissible for this purpose).

There is no need for the district court to make the initial determination of the issue whether petitioner's First Amendment rights have been violated on the basis of the record including Professor Emerson's testimony. Not only is the issue, as stated above, a question of law, but we think its resolution is perfectly clear. Professor Emerson's testimony gave no new legal or factual considerations which were not considered by this Court in *Barenblatt.* There the Court relied heavily on numerous earlier decisions which described the serious danger to the country arising from Communist activities (360 U.S. at 127–129).* *E.g., American Communications Ass'n* v. *Douds,* 339 U.S. 382, 388–389; *Dennis* v. *United States,* 341 U.S. 494, 498; *Carlson* v. *Landon,* 342 U.S. 524, 535–536; see Subversive Activities Control Act of 1950, Title I, § 2, 64 Stat. 987–989. On the other hand, Mr. Justice Black, in dissenting in *Barenblatt,* emphasized the interest "in being able to join organizations, advocate

* The Court also noted, in weighing the government's interest, the valid legislative purpose of the committee, the relevancy of the questions asked the witness, and the lack of any indication that the committee was trying to pillory the witness or was using dragnet procedures (360 U.S. at 132–134) (see *supra*, pp. 23–24).

causes and make political 'mistakes' " and contended that the interest of the government in "self-preservation" was "vastly overstated" (360 U.S. at 144). Professor Emerson's testimony added little to these basic contentions except to spell out the competing considerations in greater detail. Thus, he presented no evidence which could change the Court's determination in *Barenblatt*, *Wilkinson*, and *Braden* that Congressional committees can compel witnesses to testify concerning their Communist activities without violating the First Amendment. And, as we have shown earlier (pp. 23–24), the particular circumstances of this case are even stronger in favor of the governmental as opposed to the private interests than in those three cases.

II

THE STATUTE UNDER WHICH PETITIONER WAS CONVICTED IS NOT UNCONSTITUTIONALLY VAGUE

Petitioner contends (Pet. Br. 30–32) that the statute under which he was convicted, *i.e.*, House Rule XI, the Committee's authorizing resolution, was unconstitutionally vague. In fact, however, the petitioner was convicted of violating 2 U.S.C. 192 (see Pet. Br. 3), the contempt-of-Congress statute, which is perfectly clear. Convictions under this statute have been repeatedly upheld by this Court, as in the *Barenblatt*, *Wilkinson*, and *Braden* cases.

Petitioner's argument is therefore not aimed at the statute under which he was convicted, but rather at the resolution of the House of Representatives authorizing the Committee to conduct investigations of Communist activities. Rule XI, Rules of the

House of Representatives, 60 Stat. 823, 828 (see Pet. Br. 3). Rule XI, however, is not a criminal statute; it does not prohibit or punish any conduct. Instead, it merely confers authority on the Committee to conduct investigations within a particular area. Thus, the rules for construing criminal statutes do not apply to the construction of Rule XI.

Petitioner, however, claims (Pet. Br. 30) that this Court held in *Watkins* v. *United States*, 354 U.S. 178, 208, and *Sacher* v. *United States*, 356 U.S. 576, 577, that Rule XI must be treated as a criminal statute. Those cases state only the proposition, to which we of course agree, that "the courts must accord to the defendants [under 2 U.S.C. 192] every right which is guaranteed to defendants in all other criminal cases." 354 U.S. at 208. The Court then went on in *Watkins* and *Sacher* to require that the Congressional committee explain to the witness, upon proper objection, the pertinency of its questions to the subject under inquiry. But, as the Court expressly said in *Watkins*, the subject under inquiry could be made clear to the witness not merely by the committee's authorizing resolution, but also by the resolution of the committee authorizing the particular hearings, the opening statement of the committee chairman, the testimony of other witnesses who appear at the hearings and statements made by the committee to them, and statements made by the committee to the particular witness himself. 354 U.S. at 209–214. Thus

[1] The *Sacher* case actually involved the Senate Internal Security Subcommittee, which, of course, has a different authorizing resolution.

in *Barenblatt*, the Court relied on the opening statement of the chairman and testimony by other witnesses to show the subject under inquiry. 360 U.S. at 124–125. Rule XI was considered in *Barenblatt* only in order to determine whether the committee was authorized by the House of Representatives to conduct the investigation. In none of contempt-of-Congress cases has the Court considered Rule XI as part of a criminal statute under which the witness was convicted.

It is thus clear that the government is required to rely on Rule XI only to show that the Committee was authorized by Congress to investigate Communist activity in basic industry. This Court has specifically held that Rule XI is sufficiently clear to give the Committee authority to investigate Communist activities. In *Barenblatt*, the Court stated (360 U.S. at 117):

> Petitioner also contends * * * that the vagueness of Rule XI deprived the Subcommittee of the right to compel testimony in this investigation into Communist activity. We cannot agree with this contention, which in its furthest reach would mean that the House Un-American Activities Committee under its existing authority has no right to compel testimony in any circumstances.

After an extensive discussion of the history of Rule XI, the Court concluded that "the Rule cannot be said to be constitutionally infirm on the score of vagueness" (360 U.S. at 122–123). Similarly, in *Braden*, this Court rejected the petitioner's contention that Rule XI was "fatally vague"[*] by holding that Rule XI properly authorized the investigation,

[*] See the petitioner's brief in No. 54, Oct. Term 1960, pp. 40–42.

365 U.S. at 433; see also *Wilkinson* v. *United States*, 365 U.S. 399, 409.

In all three of these cases, this Court upheld convictions under 2 U.S.C. 192 for refusal to answer questions asked by this very same Committee pursuant to the authority given it by the House of Representatives in Rule XI. Rule XI was sufficiently clear to sustain a conviction in those cases; it is equally sufficient, under the same circumstances, to sustain petitioner's conviction here.

III

THE COMMITTEE'S RULES DID NOT REQUIRE THE COMMITTEE TO GRANT PETITIONER'S REQUEST TO APPEAR AT AN EXECUTIVE SESSION

Petitioner argues (Pet. Br. 26–29) that the Committee's failure to allow him to appear at an executive session, instead of at the public hearings, violated its rules, and so excused his refusal to answer questions in the public session. This argument, too, is without merit.

Although petitioner was served with the Committee's subpoena on January 23, 1958 (Gov. Ex. 2, p. 2), he did not ask the Committee to appear at an executive session until February 6, 1958, the Thursday preceding the Monday on which he appeared as a witness. On that date, he sent a telegram which was addressed to the Committee counsel, not to the Committee or its chairman (R. 284a), which stated (Def. Ex. 1):

> Undersigned represents Edward Yellin and Nicholas Busic. On their behalf I request executive session in lieu of open session. Testimony needed for legislative purposes can be secured

in executive session without exposing witnesses to publicity.

Since the telegram arrived in Washington after the Committee chairman and counsel had left for Gary, Indiana, to conduct the hearings (R. 37, 39). it was answered by the Committee staff director, who denied the request (Def. Ex. 2). The record shows that the staff director had no authority to act on petitioner's request (R. 286a).

Petitioner relies on Rule IV–A of the Rules of Procedure of the House Committee on Un-American Activities as requiring the Committee to grant his request for an executive session. Rule IV–A states:

> If a majority of the Committee or Subcommittee, duly appointed as provided by the rules of the House of Representatives, believes that the interrogation of a witness in a public hearing might endanger national security or unjustly injure his reputation, or the reputation of other individuals, the committee shall interrogate such witness in an executive session for the purpose of determining the necessity or advisability of conducting such interrogation thereafter in a public hearing.

Rule IV–A does not give a witness a right upon request to an executive session whenever specified circumstances are present so that the Committee's refusal to provide this right is reviewable in the courts. Instead, the rule leaves it to a majority of the Committee, or subcommittee, to decide whether to interrogate the witness in executive session. Thus, the rule provides that a witness be questioned in executive session whenever "a majority of the Committee * * *

believes that the interrogation of a witness in a public hearing might * * * unjustly injure his reputation * * *" (emphasis added). This language gives the Committee discretion whether to hear a witness in executive session.

Here, the Committee decided not to have petitioner testify at an executive session even though it did not know that petitioner had requested such an appearance. Congressman Walter testified that "the Committee * * * passed on the question of whether or not we would hear Mr. Yellin at a session when the purpose of calling him was discussed, and it was decided then that the rule with respect to an executive session was not applicable * * *" (R. 70).

We have emphasized that Rule IV–A confers no right on petitioner to have this determination reviewed by the courts. Even if Rule IV–A did implicitly provide for a right of review, it is clear than a Congressional committee has broad discretion in determining its own procedure upon such questions as whether to hear a witness in an executive or public session. There is nothing in this record to suggest that the Committee abused its discretion in this case.[9]

[9] Petitioner also suggests (Pet. Br. 27, footnote) that Rule XI(m) of the House Rules gave him the right to appear in executive session. The language of this provision indicates that it was intended to protect persons other than the witness himself from being injured since it allows the injured person "an opportunity voluntarily to appear as a witness * * *." As the Committee counsel testified at the petitioner's trial (R. 88–90), this was the Committee's interpretation of the Rule. Moreover, Rule XI(m), like Rule IV–A of the Committee's own rules, confers no right on anyone to appear in executive session unless the Congressional committee so determines—a determination which was not made in this case.

IV

THE QUESTIONS WHICH WERE THE BASIS FOR COUNTS 2 AND 4 WERE NOT TOO VAGUE TO SUPPORT THE INDICTMENT

Petitioner claims (Pet. Br. 32–34) that the questions contained in Counts 2 and 4 are too vague to satisfy the Sixth Amendment and Rule 7(c) of the Federal Rules of Criminal Procedure, which require "that in all criminal prosecutions the accused shall be informed of the nature and cause of the accusation." The question involved in Count 2 was: "Will you tell the Committee, please, whether or not incidents came to your attention of the colonization of the steel unions in Gary by the Communist Party at any time prior to September 1957?" The question involved in Count 4 was: "Will you tell the Committee whether or not in 1957 there were present in any of the steel unions at Gary, Indiana, persons who were known to you to have been colonizers of the Communist Party?"

Petitioner specifically does not question the fact that he understood the meaning of these questions. Rather, he states that "[t]he issue was not whether he understood the question, but whether the indictment met the requirements of the Sixth Amendment and of Rule 7(c) of the Rules of Criminal Procedure" (Pet. Br. 33).

A. First, petitioner is precluded from raising this issue because it was not presented—or even suggested—in his petition for a writ of certiorari. Therefore, under Rule 40(1)(d)(2) of the Rules of this Court, he cannot raise it in his brief on the merits.

unless there was "plain error." *E.g., Kessler* v. *Strecker,* 307 U.S. 22, 34.

B. In any event, petitioner's contention is clearly without merit. The Sixth Amendment and Rule 7(c) require that "[t]he indictment * * * be a plain, concise and definite written statement of the essential facts constituting the offense charged" (Rule 7(c)), so that the accused can adequately defend himself and can plead a conviction or acquittal in bar of a subsequent prosecution for the same offense. *E.g., United States* v. *Debrow,* 346 U.S. 374, 377–378. The indictment set out clearly the Committee's investigative authority, the subject under inquiry, the facts concerning the hearing, the subpoenaing of petitioner, his appearance, and his wilful refusal to answer five pertinent questions, each of which was quoted (R. 1–3). Thus, whether or not the questions themselves were vague, these allegations clearly and sufficiently allege that petitioner violated 2 U.S.C. 192 by wilfully refusing to answer pertinent questions asked by a Congressional committee. The fact that the indictment did not spell out the meaning of the questions did not prejudice petitioner either in preparing his defense or by allowing the possibility of a new prosecution for the same offense.

As to preparing his defense, it would not have helped petitioner to have the indictment specify the meaning of the questions. The charge was that he had refused to answer the questions. The only possible defense which could turn upon their meaning is that petitioner refused to answer the questions because he did not understand them. But that defense

depends on whether petitioner understood their meaning when he appeared before the Committee; if he did not understand the questions at that time, it would do no good to acquaint him of their meaning in the indictment.[10] As to a second prosecution, the indictment specified the Committee holding the hearing, the time of the hearing, and the questions petitioner refused to answer. There was no possibility of a second prosecution for petitioner's refusal to answer these same questions.

The indictment was not required to detail the meaning of the questions which petitioner refused to answer either by describing their context in the hearing or by defining the various words which were used. Frequently, questions standing alone are vague and ambiguous. For example, in the *Barenblatt* case, this Court upheld the conviction of a witness for refusing to answer the question, "Were you ever a member of the Haldane Club of the Communist Party while at the University of Michigan?" (360 U.S. at 114). The indictment never described the Haldane Club or its exact connection with the Communist Party. A requirement that such questions be explained in the indictment would be contrary to the language and purpose of Rule 7(c) that the indictment be a concise statement of the essential facts. The meaning of the question is not an essential element of the crime of contempt; it is the wilful refusal to answer which constitutes the crime.

[10] We show below (pp. 42–45) that petitioner did understand the questions at the time he refused to answer them and that, in any event, this defense is not open to him since he did not claim that the questions were vague at that time.

C. It is apparent, despite the denial in his brief, that petitioner's real contention is that the questions did not adequately apprise him of the information sought by the Committee and that therefore he cannot be convicted of contempt. We agree that a witness before a Congressional committee cannot be convicted of *wilfully* refusing to answer questions asked by a Congressional committee if the witness informs the Committee that he cannot understand what information the Committee is seeking and the Committee nevertheless fails to state or explain the questions with reasonable clarity. We emphasize, however, that the witness is required to object on the ground of vagueness at the time the questions are asked by the committee. Just as with regard to the pertinency of the questions to the subject under inquiry, the committee can easily explain the meaning of its questions if the witness is in doubt. Therefore, the issue of vagueness, like the issue whether the committee sufficiently apprises the witness of the pertinency of the questions, cannot be raised for the first time at trial. Cf. *Barenblatt* v. *United States*, *supra*, 360 U.S. at 123–124; *Deutch* v. *United States*, 367 U.S. 456, 469. Here, petitioner, although he made several objections to the questions he refused to answer, did not even indicate that he failed to understand them.

On the other hand, unlike the situation with regard to the issue of pertinency, we do not think that the government is required to prove the meaning of the questions at the witness' trial for contempt when he fails to raise the issue before the committee. In *Deutch*, this Court held, even though the pertinency

of the questions was not questioned at the hearing, that the government is required to prove pertinency at the trial. 367 U.S. 468. This holding was based entirely on the explicit requirement of 2 U.S.C. 192 that the questions be "pertinent to the question under inquiry." Since 2 U.S.C. 192 does not make the clarity of the question an element of the offense, we do not think that the government is required to prove it unless it was timely raised before the committee itself.

In any event, in this case, the meaning of the questions in Counts 2 and 4 was made clear to petitioner at the hearing and the introduction of the transcript of the hearing satisfied any burden the government may have had to show their meaning at petitioner's trial. The only possible vagueness in the two questions concerns the words "colonization" in Count 2 and "colonizer" in Count 4. Petitioner admitted that he was present while John Lautner, a long-time high official in the Communist Party, testified before the Committee (Hearings, p. 1976). During this testimony, the Party's colonization program was repeatedly described. Lautner testified that, after the 1945 reconstruction of the Party, a policy of colonization was begun (*id.* at pp. 1964–1965). He described as Party colonizers trained Party members who were assigned to organize Party activities in the steel industry in the Middle West (*id.* at pp. 1965–1966). Lautner further testified that after the 1948 Party convention one J. Peters "organized a number of classes for colonizing party members" and that in the spring of 1949 Party members, who had just graduated from college, be-

came colonizers in various industries (*id.* at p. 1967). At this point, Lautner defined a "colonizer" (*id.* at p. 1968):

> A colonized Communist is one who is a professional revolutionary, who has uprooted himself from his home environment and carried out a party instruction, one who may have had personal problems, family problems, but that was secondary. The first was the problem of the party, and he submitted himself to become a person who will solve for the party their problems and become a colonized Communist *to carry out Communist work in a basic industry.* [Emphasis added.]

Lautner said that colonizers get jobs in a major industry by misrepresenting their college education (*ibid.*). Subsequently, the counsel of the Committee summarized Lautner's testimony about Peters: "You told us about * * * classes that were conducted by J. Peters, training young men in the universities to go out and engage in colonization in industry" (*id.* at p. 1968). Lautner said that the Party believed that "the best way to get back into the main stream of labor would be to colonize capable Communist organizers in the basic industries * * *" (*id.* at p. 1971).

Before petitioner was finally ordered to answer the question involved in Count 2 concerning whether he knew of colonization by the Communist Party in steel unions in Gary, Indiana, prior to September 1957, the Party's program of colonization was explicitly described to him. The counsel of the Committee stated (Hearings, p. 1986):

> It has been testified here that colonization of young men in the middle of their educational courses in industry was a deep seated plan of the Communist Party to strengthen itself within basic industry.

After petitioner then told the Committee that he was present then Lautner testified, the Committee counsel said that "[t]he statement was made here of the practice of the Communist Party in colonizing industry at Flint, Michigan; at the University of Colorado, which is at Fort Collins, Colorado, where you now reside; and other places" (*ibid.*).

In short, we submit that the record of the hearings shows that petitioner was fully acquainted with the claim as to the Party's colonization program in basic industries before he refused to answer the questions involved in Counts 2 and 4. He clearly knew that the Committee's questions sought to obtain information of Party organizing activities in the steel industry in Gary, Indiana.[11]

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[11] Even if, contrary to our contentions above, Counts 2 and 4 are invalid because of the vagueness of the questions, petitioner's conviction still must be affirmed. He received concurrent sentences on all four counts and therefore his conviction must be sustained if any one count is valid. *E.g.*, *Barenblatt* v. *United States*, 360 U.S. 109, 115.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the court of appeals should be affirmed.

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